No. 20,290

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN PUMICE COMPANY, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINION BELOW

The opinion of the district court (R. 375-396) is reported at 236 F.Supp. 44.

JURISDICTION

The jurisdiction of the district court over this condemnation action arises from the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177, and the Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257 (R. 5). Final judgment

was entered March 8, 1965 (R. 446). Notice of appeal was filed May 7, 1965 (R. 452).[1/] The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether in this condemnation valuation case there is any support in the objective facts or in law for the district court's award for pumice deposits arrived at by constructing a hypothetical pumice mining, processing and selling business; multiplying the assumed net profit per ton of that business venture by the estimated tons to be produced in five years; and returning the resultant figure directly as the market value of the deposits.

2. Whether the district court erred in rejecting all comparable sales.

STATEMENT

This appeal is from a judgment in two consolidated condemnation proceedings instituted by the United States to

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1/ The delay in prosecuting this appeal was occasioned by the following facts: The American Pumice Company has been bankrupt since 1946. After the notice of appeal was filed here, the trustee in bankruptcy and the United States reached a settlement agreement, which was approved by the bankruptcy court. However, in an action by a stockholder, this Court, in P. S. Seymour-Heath v. George T. Goggin, Trustee, Etc., No. 21,868 (January 10, 1968), set aside the settlement for want of approval by the stockholder. The present appeal had been held in abeyance pending the outcome of that litigation.

acquire exclusive use of a large area of land in Inyo, Kern and San Bernardino Counties, California, for a Naval Ordnance Testing Station. The property interests involved are pumice mining claims on public lands of the United States. These claims had been located by various individuals and ultimately assigned or leased to the appellee, American Pumice Company.

The first condemnation action (Civil No. 3472) was filed on February 23, 1944 (R. 2). It embraced the "Brown Group" of claims (R. 376).[2/] Orders for immediate possession, upon 30 days' written notice, were entered on February 24 and April 18, 1944 (R. 16, 24), and a declaration of taking was filed on October 19, 1945 (R. 52).

The second condemnation action (Civil No. 311) was instituted on March 20, 1945 (R. 160). It embraced the "Donna-Gill" claims (R. 376).[3/] An order for immediate possession was obtained on March 30, 1945, and American Pumice Company vacated the premises on May 29, 1945 (R. 171, 380). On August 22, 1945,

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2/ These include "Tired Boy," 160 acres; "White Gold," a group involving two overlapping 20-acre claims; "White Eagle No. 2," 20 acres; and "Gray Boy," 20 acres (R. 376).

3/ These include "Donna Nos. 3 and 4," 80 acres; and "Ray Gill No. 31," 160 acres (R. 376).

the project boundaries were revised by amended complaint to exclude Donna Nos. 3 and 4 and a part of Ray Gill No. 31 (R. 380). The court found that the amended complaint was never served on appellee and that appellee was not otherwise apprised of the filing (R. 380). The order of dismissal of these areas was not entered until September 24, 1956. The court found that no notice of this order was served on appellee. In 1946, one Mr. Splane, took a lease and option on these excluded claims from the origina locators (Wicks and Gill) and operated the mines, making sales to the Navy. In these circumstances, the court held that under Rule 71A(i)(3), F.R.Civ.P., the appellee was entitled to compensation for a taking of them (R. 381-383).

The issue on appeal relates solely to the value of the claims. That issue was tried by the district court without a jury.[4/] As indicated, the United States owned the fee in these tracts and the American Pumice Company held leases or assignments from individual locators of mining claims. The lands are located in a remote and rugged area of southern California northeast of Los Angeles. They contain deposits of pumice useful in construction work.

4/ Various issues of ownership were also tried by the court, as shown by its opinion, but they are not raised here.

The Donna-Gill claims are about 50 miles away from the Brown claims (R. 385). Prior to the taking, there had been some open-pit production from the Donna-Gill claims and some (less) production underground from the Tired Boy and White Gold claims in the Brown Group (Tr. 364, 384, 441). This was marketed in the Los Angeles area.[5/]

Appellee's Valuations. Appraisal witnesses for the American Pumice Company gave opinions of value based on a capitalization of net profits from an operation which would mine, process and deliver bagged pumice f.o.b. to the nearest railhead at Sykes, California.[6/] Thus, the witness, Mr. Frederick, estimated the tons of pumice on the claims (Tr. 659-660, 680-698, 745, 939, 1064), the costs of building roads, bagging, sales promotion, etc. (Tr. 745, 1053, 1055, 1116, 1200), the amount of capital investment needed, annual production (Tr. 1067, 1123), and f.o.b. prices (Tr. 1038). From this he computed a net profit of $1.63 per ton (Tr. 1059). He assumed total production, i.e.,

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5/ The bulk of the production had been sold to the Navy in 1944 and 1945 for use on this Ordnance Testing Station (Tr. 388, 402, 415, 439-440, 984, 1006-1008).

6/ Government counsel moved the court unsuccessfully, on several occasions, to strike the opinions of each of these witnesses on the ground that their valuations were on an incorrect basis (Tr. 864-865, 1214, 1263, 1306-1307, 1360).

100,000 tons a year for the first five years and 130,000 a year after that (Tr. 1064, 1123). Since there was some question at the trial as to the duration of the lease on the Donna-Gill claims he made two estimates of value on that group.[7] On the basis of 10½ years of production, he valued that group at $798,000, i.e., Donna at $495,000 and Gill at $303,000 (Tr. 1171-1172). On a 19-year life, he valued that group at $1,108,000, i.e., Donna at $687,000 and Gill at $421,000 (Tr. 1172). To these figures he added his valuation of the Brown Group (for 35½ years) at $251,000 (Tr. 1067, 1174-1175).[8] Thus, his total values on those bases were $1,049,000 and $1,359,000, respectively. On a 14-years' operation for the Donna-Gill claims he found a total value of $1,148,000 (Tr. 1062).[9] He used a 10% compound interest discount rate, meaning a rate by which to reduce the projected future return to a present cash value (Tr. 1062-1064). He did not investigate sales of comparable mining claims (Tr. 1184).

7/ The court reserved its determination of ownership until after the valuation trial.

8/ White Gold $108,000, Tired Boy $90,000, Gray Boy $25,000 and White Eagle No. 2 $28,000 (Tr. 1176).

9/ On the Gill claim, assuming a lease with an option to purchase for $10,000, he found a value of $457,000 (Tr. 1337-1338). On the Donna claims, assuming a lease and purchase option of $5,000, he found a value of $757,000 (Tr. 1340).

Appellee's witness, Mr. King, found value by discounting future profits (straight discount) at 10% (Tr. 829, 837). He estimated the quantity of pumice, the selling price, and deducted mining and processing costs of labor, supplies, supervision, repairs, replacement, hauling, power and utility rental, compensation insurance, social security, welfare, taxes, licenses, office and travel and research (Tr. 830, 835, 840). He discounted "arbitrarily" 20% for capital investment (Tr. 837). He assumed total production at the rate of 55,700 tons per year and found a "net operating profit" of $1.87 and $2.12 per ton, respectively, on the two groups (Tr. 835, 839, 841-842, 916). On that basis, he valued the Brown Group (30-year life) at $310,200 (Tr. 837-838).[10] and the Donna-Gill claims at $600,000--Donna at $343,000 and Gill at $277,000 (Tr. 850-851). He valued all the claims as operating as a unit, because absent monopoly control there would not be a sufficient market for total production (Tr. 850).

Appellee's witness, Mr. Schmidt, applied present value tables to his computations from estimated annual production of 118,000 tons, 10% interest on investment, 4% interest on a sinking

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10/ He valued Tired Boy at $157,900, White Gold at $124,000 and White Eagle No. 2 at $28,000 (Tr. 837-838).

fund and cost figures obtained from the Company's books (Tr. 1249-1250). He did not value the Brown Group. On the basis of nine years of production, he valued the Donna and Gill claims at $700,000--Donna $436,000, Gill $264,000 (Tr. 1249-1252). If valued separately, the total was reduced to $571,000--Donna $420,00 Gill $151,000--because of two overheads (Tr. 1259). If the Gill claim was under a five-year lease with an option to purchase it at $10,000, he found a value for the lease of $141,000 (Tr. 1275). In addition, the lessor's interest would be worth $10,000 (Tr. 1311 If the Donna claim was under a lease with a royalty payment of 25 cents per ton, without a termination provision, he valued the lease at $420,000 (Tr. 1275-1282). In that circumstance, the lessor's interest would be a capitalization of the royalty, or $104,800, to be taken out of the $420,000 (Tr. 1315-1316).

The Government's Valuations. Mr. Schuette, testifying as to the Brown Group, stated that underground pumice mining has not been profitable since 1943 (Tr. 1732). He said that these claims are worth nothing today--e.g., wages have increased from $5 per day to $25 per day (Tr. 1773). The claims might still have had a small speculative worth at the date of taking.

Accordingly, he assigned a value to them of $1,100 (Tr. 1732).[11] He found no value in the Gill lease and option because "you could get a better bargain" (Tr. 1739-1740). As to the Donna-Gill claims, he testified that there was no record of profitable operations on them and that open-pit operations have never shown a profit out there (Tr. 1741). The business is highly competitive (Tr. 1742). He assigned a value to these claims of $18,500--Donna $11,000, Gill $7,500 (Tr. 1739). Thus, his total valuation was $19,600.

Mr. Jones examined sales of comparable claims in this area and in other areas about 130 miles distant (Tr. 1763-1766, 1783-1793). The court excluded consideration of the latter (Tr. 1793). As to the Brown Group, he believed that such remote, inaccessible, underground deposits were not competitive (Tr. 1797-1798). He valued them at $1,200 (Tr. 1797).[12] He valued the Donna-Gill claims at $20,000--$10,000 each (Tr. 1799-1800). This was on the basis that there had never been a profit on them, but that some day, with new methods or market, there might be (Tr. 1800). His total valuation was $21,200. He had no knowledge of any lease

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11/ Tired Boy $550, White Gold $350, White Eagle No. 2 $100, and Gray Boy $100 (Tr. 1732).

12/ Tired Boy $500, White Gold $500, Gray Boy $100 and White Eagle No. 2 $100 (Tr. 1797).

on the Donna claim (Tr. 1800). He assigned a nominal ($10 to $100) value to the lease on the Gill claim as the value of the option (Tr. 1799). In his opinion, the 25 cents per ton royalty was high, there being others in the area at 10 cents per ton (Tr. 1799). He stated that the locator, Mr. Gill, believed that the option price of $10,000 was reasonable (Tr. 1801).

The District Court's Award. The district court rejected the valuations of the Government's witnesses because of their brief inspections of the properties and because they "made no effort to make any calculations of the amount of pumice in place" (R. 387). It held that the Government's insistence on the use of comparable sales as the correct method to value these properties was misplaced and that, in any event, there were no comparable sales because it "is difficult to see how pumice claims can be comparable to one another unless adjacent or nearly so, as the quantity, quality, mining costs and access to market vary with each property" (R. 387-389). Disagreeing with an earlier decision in that district, United States v. Land in Dry Bed of Rosamond Lake, Cal., 143 F.Supp. 314 (S.D. Cal. 1956), it approved computing value by multiplying the quantity of pumice by the going unit price (R. 389). The court further held that "in mining

claims, as in oil and gas, a lease with the lessee paying a royalty to the owner, with or without an option to buy, is frequently, in fact almost always if mineral in any quantity is present, of much greater value than the undeveloped claim" (R. 386).

Considering the increasing competition with pumice of a new construction material ("expanded shale"), the court found that the life of the market for this pumice would have been five years (R. 395). The court said that it selected a value from appellee's witness, Schmidt, of 50 cents per ton in place (R. 395). Then, selecting an annual production for each claim, it made the following computations (R. 394-396):

Claim	Production (Tons Per Year)	Total Production (Five Years)	Value at 50¢ Per Ton
Donna Nos. 3 and 4	31,000	155,000	$77,500
Ray Gill No. 31	19,000	95,000	47,500
Tired Boy	9,800	49,000	24,500
White Gold	8,100	40,500	20,250
White Eagle	2,000	10,000	5,000
Gray Boy	3,000	15,000	7,500
	72,900	364,500	182,250

The court found that the American Pumice Company was obligated to pay a total royalty of $5,000 to the locators of Donna Nos. 3 and 4, which was the value to the locators, so that the Company's value was reduced to $72,500. Since no one claimed that $5,000, it was not awarded. Similarly, as to Ray Gill Nos. 31, the court found the total value to the locator to be $10,000, minus any royalties received, so that the Company's value was reduced to $37,500. Since the locator waived his interest, the $10,000 was not awarded. As a result, the court entered judgment awarding $167,200 to the American Pumice Company as just compensation for the taking (R. 449). This appeal followed.

SPECIFICATION OF ERRORS

1. The district court erred in valuing the pumice deposits from the assumed net profit of a hypothetical pumice mining, processing and selling business.

2. The district court erred in multiplying a computed net profit per ton by the number of tons estimated to be produced in five years and returning the resultant figure directly as the condemnation award.

3. The district court erred in refusing consideration of all comparable sales.

4. The district court erred in assuming large annual sales of pumice from each of the deposits concurrently.

5. The district court erred in not regarding the sales prices of some of these very pumice claims, near the dates of taking, as bearing on the value of appellee's property interests.

6. The district court erred in compensating the appellee for loss of business profits rather than for the value of the property taken.

7. The district court erred in relying on opinion testimony without any support in the demonstration and physical facts.

8. The district court erred in basing the award on conjecture, speculation and unwarranted assumptions.

9. The district court erred in accepting the witness Schmidt's per-ton valuation and in applying it to a different duration and amount of production.

10. The district court erred in relying on a computation from earnings of a business venture, using an interest (risk) rate without any showing of support for it in comparable investments.

11. The district court erred in mathematically calculating value.

12. The district court erred in not reducing assumed earnings for the future to their worth at the date of valuation.

ARGUMENT

THE DISTRICT COURT ERRED IN REJECTING THE EXISTING MARKET PRICE OF PUMICE DEPOSITS AND VALUING A HYPOTHETICAL BUSINESS VENTURE

A. The court erroneously refused to consider any comparable sales. - The courts have repeatedly held that where sales of the same or comparable property exist, they should be considered as the best indication of market price and that "resort * * * to other data to ascertain its value" is clearly a secondary and conjectural approach. E.g., United States v. Miller, 317 U.S. 369, 374-375 (1943); Olson v. United States, 292 U.S. 246, 257 (1934); Montana Railway Co. v. Warren, 137 U.S. 348, 352 (1890); United States v. Sowards, 370 F.2d 87, 89 (C.A. 10, 1966); United States v. Whitehurst, 337 F.2d 765, 775 (C.A. 4, 1964). As the court said in Baetjer v. United States, 143 F.2d 391, 397 (C.A. 1, 1944), cert. den., 323 U.S. 772:

> In fact, in the absence of recent transactions of a like nature involving the land itself, they are the best evidence of market value. What comparable land changes hands for on the market at about the time of taking is usually the best evidence of market value available. In the absence of such evidence a determination of value becomes at best only a guess by informed persons.

Real property may be unique and the comparable sales too few to establish a conclusive market price, "But that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's property." United States v. Toronto Nav. Co., 338 U.S. 396, 402 (1949); United States v. Whitehurst, supra.

The Government sought to offer evidence of the sales prices of pumice claims in the same county as some of these claims (about 130 miles away) and in the next county to the north (Tr. 1783-1794). The court sustained objection to these and in its opinion said (R. 388): "It is difficult to see how pumice claims can be comparable to one another unless adjacent or nearly so, as the quantity, quality, mining costs and access to markets vary with each property." But those factors go to the weight of the evidence and could have been fully developed

by appellee on cross-examination. This absolute exclusion of other than nearly adjacent properties was unduly restrictive under the foregoing authorities and under United States v. Lowrie, 246 F.2d 472 (C.A. 4, 1957). Certainly, those sales prices, with any necessary adjustments, would have had a closer bearing on market value than the structure of assumptions on which the court relied.

In addition, the court gave no consideration to the fact that some of the very mining claims involved had been sold, both before and after the date of taking, for relatively small amounts. The reason given by the court for not considering these sales was that "in mining claims, as in oil and gas, a lease with the lessee paying a royalty to the owner, with or without an option to buy, is frequently, in fact almost always if mineral in any quantity is present, of much greater value than the undeveloped claim" (R. 386).

But regardless of whether that factual assumption is supportable, that position is not apposite to the circumstances and sales involved here. Gray Boy and White Eagle No. 2 were undeveloped. Donna Nos. 3 and 4 were developed and had been operated by this very Company, yet in 1946, Mr. Wicks sold them to Mr. Splane for $5,000 (Tr. 493). Both men were

experienced in the mining industry. Previously, appellee had succeeded by assignment to a lease and option to purchase these Donna claims (plus others) for $5,000 pursuant to an agreement executed in 1942 (Tr. 1363-1366). In 1943, Mr. Gill executed a lease for Ray Gill No. 31 to American Pumice Company with an option to purchase for $10,000 and in 1946 Mr. Gill sold that claim which had been operated by this very Company to Mr. Splane for $15,000[13/] (Tr. 1385, 1387).

It is noteworthy that Mr. Splane incurred liabilities of $180,000 trying to operate the Donna-Gill group in 1946 and 1947 (Tr. 1813, 1829, 1839-1840). This circumstance bears on the district court's reference to the fact that in 1947 Mr. Newby (partner in Desert Materials Company and President of Crownite) paid $15,000 to Gill and $5,000 to Wicks (the locators of the Donna-Gill group) and $250,000 to Splane (and his creditors) who held the lease and option (R. 387). The court used this to show that "a lease with the lessee paying a royalty to the owner * * * is of much greater value than the undeveloped claim" (R. 386-387). But that purchase price was $170,000 more than Mr. Newby intended to pay because the purchase agreement with Splane included assumption of Splane's liabilities which were

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13/ This price included four additional claims (Tr. 1387).

$150,000 more than Splane had represented (Tr. 1839-1840), and because Newby had not known that anything was owing to the locators (Tr. 1814). The remaining amount covered eight locations in addition to Donna Nos. 3 and 4 and Ray Gill No. 31 (Tr. 1830) and all of Splane's personal property and equipment as well as his business in Los Angeles and provided funds "to purchase additional equipment and as additional working capital of said business" (Def. Ex. CP; R. 383, fn. 1). In short, it was a sale of Splane's pumice mining and selling business to Newby, with Splane remaining as "head of the sales department" (Def. Ex. CP). So, again in this reference, the court looked to the price of a business to support its valuation of an interest in real property.

The court referred to a report by appellee's witness, Mr. Schmidt, made to the Navy on November 18, 1946, when he was employed by the Government, which stated that the value of the Ray Gill No. 31 claim was $8,000 because it contained $500,000 worth of pumice (R. 387; Tr. 1350; Pl. Ex. 13). This was used again to support the view that a lease is worth more than "an undeveloped claim." But this was not an undeveloped claim. It had been worked by the American Pumice Company. The mere

placing of an operating company on or off the property cannot affect the value of a known deposit. The presence of $500,000 worth of pumice is not, contrary to the court's apparent belief, an additional factor to be added to the market value which Schmidt expressed based on that amount and value of pumice in the ground. It was obviously Schmidt's judgment, at that time, that operating companies were paying about $8,000 for such a deposit, having in mind the vagaries of the market and of costs. Certainly, operating companies were not paying each other more merely because an operating company was on the property by lease. There was nothing that the presence of an operating company or the existence of a lease could have added to the value of this known and developed deposit. There was no evidence that anyone ever paid the net profit per ton testified to by appellee's witnesses and used directly as their valuations.

So again in this respect, we submit, the court has led itself away from what pumice deposits actually sell for in the market--by being concerned with computed possibilities of earnings of a pumice producer. This overlooks the fact that the prices actually paid in the market already have taken those possibilities into account. The market price reflects

the actualities as conceived by both owners and producers. There is no occasion for a condemnation valuation court to construct a market price which it thinks ought to exist or which it believes can be supported by certain facts and assumptions. The dealers in pumice deposits in the market place have not reached that result. And, as will be shown, it is their valuation which must govern in a condemnation proceeding.

B. The facts here show the fallacy of the court's method of valuation. - In this case the Government acquired a property interest--mining claims[14]--but it is paying for the net profits of an assumed profitable business venture. Appellee's witnesses and the court did not consider the actual sales prices of working or workable pumice mining claims. Instead, they constructed from assumptions a hypothetical business venture on these properties, computed its assumed profit, and returned that as the value of the property interest. The circumstances here clearly show the fallacy of that method of valuation and why courts have rejected it.

14/ It has been assumed that these were valid mining claims. However, the evidence suggests the question whether the facts were sufficient to demonstrate an existing valid discovery at the date these lands were devoted to naval uses.

In the first place, as to production, appellee's witnesses and the court have assumed large annual sales of pumice from each of these claims concurrently. The court assumed total sales of 72,900 tons per year (R. 394-396). Nothing approaching that tonnage had ever been sold from these properties before. No pumice had ever been produced from Gray Boy or White Eagle No. 2. Production from White Gold had only been "periodic" (Tr. 112). There had been no production by appellee from Ray Gill No. 31 after August 23, 1943 (Tr. 1376-1377). The actual yearly production from all the claims involved here, excluding sales to the Navy, for the years 1941 through 1944 was 1,661 tons, 1,591 tons, 1,569 tons and 9,710 tons (Tr. 1005-1006). The total production of pumice in the entire State of California (including sales to the Navy) for the five years following the taking here was 83,900 tons in 1945, 116,650 in 1946, 152,900 in 1947, 178,300 in 1948, and 135,700 in 1949 (Tr. 1002, 1125-1128). Appellee's own witnesses acknowledged that these claims could not economically all compete with each other at the same time for the available market (Tr. 410, 863, 907). And, with respect to the Brown Group, the unrebutted evidence is that there have been no underground pumice mining operations in California since 1943 because that type of operation is too costly (Tr. 1732, 1797).

In the second place, as to the assumed "net profit," it was never shown that these claims had ever been profitably operated before the taking--even with substantial sales to the Navy[15/] (Tr. 388, 415, 439-440, 984, 1006-1008, 1125, 1151). The Company had operated at a loss of 50 cents per ton in 1944 and 1945 (Tr. 1169). The Government was not permitted to show whether the Donna-Gill group (the principal producers) had been profitably mined for the 17 years following their exclusion from the Project, when they were being worked by Desert Materials Company and then by Crownite Corporation, on the ground that such evidence involved too many uncertain factors or, in the court's words, "There are too many things that enter into it," including competence of the management, bookkeeping methods, general overhead, interest on bank loans, salaries, etc. (Tr. 1824-1826). But the court permitted appellee's witnesses to construct a hypothetical business venture based on estimates of precisely those factors and the many others involved in such a venture and to compute from

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15/ In ascertaining the demand or market for this material, the requirements of the Government for the project for which the property is taken must be totally excluded from consideration. United States v. Miller, 317 U.S. 369 (1943); United States v. Cors, 337 U.S. 325 (1948); United States v. Whitehurst, 337 F.2d 765, 772 (C.A. 4, 1964).

the assumed success of that business a sum of money which they returned directly as the value of the property interests involved here. And this was the method followed by the court. We submit that use of such a wholly conjectural method of valuation was erroneous, particularly where there were several sales of the very property interests involved near the dates of taking. Otherwise "that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value--a thing to be condemned in business transactions as well as in the judicial ascertainment of truth." Olson v. United States, 292 U.S. 246, 257 (1934).

C. The law prohibits the court's method of valuation. - Over the years, the courts have developed working rules for condemnation valuation proceedings. In general, these rules have had as their purpose the assurance (1) that the valuation is for what was actually taken and (2) that the valuation has realistic ties to the market place. The need for those rules is illustrated by this case.

Thus, the valuation here was directly based on the earnings ("net profit") of a hypothetical pumice mining and selling business. But that is not what the Government took. Loss or frustration of business profits is not compensable.

Bothwell v. United States, 254 U.S. 231 (1920); Joslin Co. v. Providence, 262 U.S. 668 (1923); Mitchell v. United States, 267 U.S. 341 (1925); United States v. Petty Motor Co., 327 U.S. 372 (1946).

The alleged profitableness of the business was contrary to the evidence of past experience and was premised on instantly commencing sales from all the deposits of quantities which had never been sold before and which all witnesses agreed could not simultaneously be sold at a profit. "Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts on which it is based." State of Washington v. United States, 214 F.2d 33, 43 (C.A. 9, 1954), cert. den., 348 U.S. 862. "* * * an opinion is no better than the hypothesis or the assumption upon which it is based." International Paper Company v. United States, 227 F.2d 201, 205 (C.A. 5, 1956). "Where unwarranted theories of law or assumptions of fact guide the expert and are used as a basis for value by the Court, the evaluation will be set aside and the cause remanded for new findings." United States v. Honolulu Plantation Co., 182 F.2d 172, 178 (C.A. 9, 1950), cert. den., 340 U.S. 820; Atlantic Coast Line R. Co. v. United States, 132 F.2d 959, 963 (C.A. 5, 1943).

In United States v. Whitehurst, 337 F.2d 765, 772 (C.A. 4, 1964), and United States v. Chase, 260 F.2d 405 (C.A. 2, 1958), the courts rejected similar, computed, hypothetical values for sand and gravel as "unrealistic, speculative and lacking the necessary factual support" and for want of "any basis in fact." In United States v. Sowards, 370 F.2d 87, 92 (C.A. 10, 1966), the court, rejecting a computed value for a coal deposit, said that an "opinion or estimate [of value] must be founded on substantial data, not mere conjecture, speculation or unwarranted assumption." This Court has recently rejected a condemnation valuation based on capitalization of earnings for those same reasons in Public Utility Dist. No. 1 of Pend Oreille Co. v. City of Seattle, 382 F.2d 666, 674 (1967).

The court accepted Mr. Schmidt's value of the pumice "which amounts to approximately 50 cents per ton in place"[16/] and found "that the life of such market would be five years" (R. 394). But Mr. Schmidt did not find a value of 50 cents per ton, or any other per ton value, for all purposes and circumstances. It was a computed figure that took into

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16/ We have not been able to reach this per ton value from Mr. Schmidt's figures. He did not even value the Brown Group of claims (underground) to which the court applied this figure.

account 10% interest on investment, return of investment, 4% interest on a sinking fund and present value tables (Tr. 1249-1250, 1315-1316). Hence, the figure would vary with the number of years of estimated operation. Schmidt estimated nine years (Tr. 1249-1252). Moreover, Schmidt's value was directly related to his estimated quantity of production which the court did not use (Tr. 1351-1353). Therefore, the court's application of "Schmidt's opinion as the most reasonable one on this point" to a five-year operation and a different quantity of production was not use of Schmidt's figure at all.

Moreover, neither Schmidt nor any witness for the appellee supplied any indication that the interest (risk) rate which they selected in their computations had any support in comparable investments. As the court said in United States v. Whitehurst, 337 F.2d 765, 772-773 (C.A. 4, 1964), reversing a valuation of a sand and gravel pit:

> The capitalization or interest rate selected and applied in the formula used here reflects the degree of risk in the undertaking involved. It is an extremely important figure in the computation because a change of even a fraction of one per cent

will produce a surprisingly material change in the result. In United States v. 158.76 Acres of Land, etc., 298 F.2d 559 (2 Cir. 1962), involving deposits of gravel, the court rejected a valuation based on the capitalization of income theory like the one used here and stated at page 561:

> "* * * Capitalization of income comprehends the use of a rate of return in comparable investments. See United States v. Leavell & Ponder, Inc., 5 Cir., 286 F.2d 398, 407, cert. den. 366 U.S. 944, 81 S.Ct. 1674, 6 L.Ed.2d 855 * * *. There was no testimony whatever about comparable investments. Mr. Chatterton merely used a formula from a handbook of factors for present value of an annuity of $1.00 per year. Nor was there testimony by any witness that a commercial market for gravel would persist for 40 or 60 years."

In the cited Leavell & Ponder, Inc., case, 286 F.2d 398 (5 Cir. 1961), Chief Judge Tuttle wrote at page 407:

> "* * * For one to give an opinion on value he is ordinarily required to base such opinion on knowledge of sales at arm's length and without compulsion of comparable properties or on knowledge of the rate of return which the ordinary prudent investor requires in order to invest in a comparable project when he has complete freedom of choice."
>
> * * * * *
>
> "* * * Clearly 'capitalization of income' comprehends the use of a rate of return in comparable investments.

> Evidence of rate of return that is in no way related to a comparable investment does not meet this requirement.
>
> "The absence of any conclusion of value supported by competent evidence in the record requires that the judgment of the trial court be set aside."

The district court, in its opinion, cited a series of decisions in support of its valuation method. The thrust of those decisions, according to the court, is approval of multiplication of quantity of material in the ground by unit price. We agree that the estimated quantity of material and the unit price are matters, among others, to which the expert may properly give consideration and his opinion may not be excluded because he did so. But it is a far different thing and we know of no decision that authorizes use of the product resulting from multiplication of the two as the direct conclusion as to the value of the entire deposit. Such a method is simply contrary to human experience. "No man of business experience would buy property on that theory of value." United States v. Indian Creek Marble Co., 40 F.Supp. 811, 822 (E.D. Tenn. 1941); United States v. Sowards, 370 F.2d 87, 91 (C.A. 10, 1966).

For that reason, it has been repeatedly held that "in condemnation cases valuation is not a matter of mere mathematical calculation but involves the exercise of judgment." United States v. Whitehurst, 337 F.2d 765 (C.A. 4, 1964); Parkbelt Homes v.

United States, 171 F.2d 230 (C.A. 4, 1948); United States v. Toronto Nav. Co., 338 U.S. 396, 401-402 (1949); Standard Oil Co. v. So. Pacific Co., 268 U.S. 146, 156 (1925); United States v. Brooklyn Union Gas Co., 168 F.2d 391, 398 (C.A. 2, 1948).

We agree with the earlier decision in this district by Judge Carter in United States v. Land in Dry Bed of Rosamond Lake, Cal., 143 F.Supp. 314, 322 (S.D. Cal. 1956), that "In other words, a clear distinction must be drawn between what is presented and considered as a factor underlying the expert's opinion as contrasted with opinion as to the fair market value of the substance, timber or mineral itself, apart from the land." That decision further stated (p. 315):

> Quantity and Quality of rock, mineral or timber in place and the per ton or unit value thereof cannot be multiplied out to give market value; nor may it be valued separate from the land.
>
> "* * * The separate valuation of timber or rock attached to land, or valuations arrived at by a process of multiplying the number of cubic feet or yards by a given price per unit, are not approved bases for evaluation. United States [ex rel. Tennessee Valley Authority] v. Indian Creek Marble Co. D.C. 40 F.Supp. 811. * * *" United States v. 13.40

> Acres, D.C. Cal. 1944, 56 F.Supp. 535, at page 538. From the facts of that case, the experts for the landowner did exactly the thing shown in the quote, namely multiplied the yards by a given price and arrived at a valuation. The court properly granted a motion for a new trial.

The reason why that figure cannot realistically be returned as the market value, even when adjustments are sought to be made, was stated in Georgia Kaolin Co. v. United States, 214 F.2d 284, 286 (C.A. 5, 1954), cert. den., 348 U.S. 914:

> In rejecting the method of multiplying the estimated amount of clay by a fixed price per unit, the conclusion is largely based on its speculativeness. In discussing this point, the court below said that whether or not the deposits would be mined and the royalties paid would depend upon the condition of the market, the uncertainty of the future, the demand for the product, "and many other elements, on and on, in the future."

See also Mills v. United States, 363 F.2d 78 (C.A. 8, 1966); United States v. 158.76 Acres in Townshend, Vermont, 298 F.2d 559, 561 (C.A. 2, 1963); United States v. Glanat Realty Corp., 276 F.2d 264, 265 (C.A. 2, 1960); United States v. Rayno, 136 F.2d 376, 380 (C.A. 1, 1943), cert. den., 320 U.S. 776. Compare Olson v. United States, 292 U.S. 246, 257 (1934); United States v. Cunningham, 246 F.2d 330, 333 (C.A. 4, 1957); United

States v. Meyer, 113 F.2d 387, 397 (C.A. 7, 1940), cert. den., 311 U.S. 706; Morton Butler Timber Co. v. United States, 91 F.2d 884, 887-888 (C.A. 6, 1937).

In United States v. Sowards, 370 F.2d 87, 91 (C.A. 10, 1966), the court quoted with approval the following expression in United States v. Indian Creek Marble Co., 40 F.Supp. 811, 822 (E.D. Tenn. 1941):

> True it is that quality and quantity have a place in the mind of the buyer and the seller, but the product of these multiplied by a price per unit should be rejected as indicating market value when the willing seller meets the willing buyer, assuming both to be intelligent. Values fixed by witnesses on such a basis are practically worthless, and should not be accepted.

For all the foregoing reasons, we submit that the district court, in its unique result, has stepped outside the limits of the established working rules in condemnation valuation proceedings and, in so doing, has committed reversible error.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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APRIL 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

S. Billingsley Hill

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APPENDIX

TABLE OF EXHIBITS

PLAINTIFF'S EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
2 to 5, incl.		Tr. 601
6, 7		Tr. 602
8	Tr. 688	
9	Tr. 1132	Tr. 1883
9A	Tr. 1780	Tr. 1883
10	Tr. 1189	Tr. 1388
11	Tr. 1286	
12	Tr. 1292	Tr. 1295
13	Tr. 1319	Tr. 1334
14	Tr. 1360	Tr. 1372
15	Tr. 1360	Tr. 1375, 1884
16	Tr. 1360	
17		Tr. 1388
18		Tr. 1687
19	Tr. 1683	Tr. 1687
20	Tr. 1693	Tr. 1694
21	Tr. 1709	Tr. 1745
21A-1 to 21A-11, incl.	Tr. 1709	Tr. 1715
22	Tr. 1709	Tr. 1745
22A-1 to 22A-4, incl.	Tr. 1709	Tr. 1745
23	Tr. 1721	Tr. 1724
24	Tr. 1724	Tr. 1745
25	Tr. 1757	Tr. 1758

DEFENDANT'S EXHIBITS */	FOR IDENTIFICATION	IN EVIDENCE
A to AA, incl.	Tr. 14	Tr. 261, 264, 26 320, 339, 632
A		Tr. 21
B to J, incl.		Tr. 1880
L		Tr. 1878
AB	Tr. 114	Tr. 120
AC	Tr. 114	Tr. 120
AD	Tr. 114	Tr. 121
AE to AS, incl.	Tr. 114	
AT	Tr. 148	Tr. 150
AU	Tr. 148	Tr. 153, 1879
AV	Tr. 148	Tr. 153
AW, AX	Tr. 148	Tr. 1879
AY	Tr. 148	Tr. 159
AZ	Tr. 148	
BA	Tr. 148	
BB	Tr. 148	Tr. 162
BC	Tr. 148	Tr. 163
BD to BJ, incl.	Tr. 148	
BK	Tr. 157	Tr. 166
BL	Tr. 157	Tr. 167
BM	Tr. 168	Tr. 171
BN	Tr. 168	Tr. 173
BO	Tr. 168	Tr. 175
BP	Tr. 168	
BQ	Tr. 168	Tr. 177

*/ Exhibit T withdrawn (Tr. 266).

DEFENDANT'S EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
BR	Tr. 168	
BS	Tr. 168	Tr. 179
BT	Tr. 168	Tr. 180
BU	Tr. 168	Tr. 181
BV	Tr. 168	Tr. 181
BW	Tr. 168	
BX	Tr. 168	
BY	Tr. 168	Tr. 186
BZ	Tr. 203	Tr. 204
CA	Tr. 203	Tr. 206
CB	Tr. 247	Tr. 270
CC	Tr. 268	Tr. 1880
CD	Tr. 299	Tr. 299, 1881
CE	Tr. 312	Tr. 447
CF	Tr. 532	Tr. 537, 780
CG		Tr. 781, 1881
CH	Tr. 832	Tr. 578
CI	Tr. 997	Tr. 1031
CJ	Tr. 1032	Tr. 1033
CK	Tr. 1032	Tr. 1035
CL	Tr. 1134	
CN	Tr. 1425	Tr. 1438
CO	Tr. 1456	Tr. 1882
CP		Tr. 1665
CQ	Tr. 1791	Tr. 1882
CR	Tr. 1791	Tr. 1882
CS	Tr. 1791	Tr. 1882
CT	Tr. 1791	Tr. 1882
Y-1	Tr. 334	
Y-2	Tr. 368	Tr. 372

DEFENDANT'S EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
Z		Tr. 578
Z-1	Tr. 581	Tr. 581
311A to 311D, incl.	Tr. 615	
3472A	Tr. 615	Tr. 641, 1844
3472B	Tr. 615	
3472B-1	Tr. 646	Tr. 660
3472B-2 to 3472B-7, incl.	Tr. 661	Tr. 664
3472B-8 to 3472B-10, incl.	Tr. 666	Tr. 669
3472B-11	Tr. 716	Tr. 717
3472C	Tr. 615	
3472C-1	Tr. 671	Tr. 680
3472C-2 to 3472C-7, incl.	Tr. 682	Tr. 685
3472D	Tr. 615	
3472D-1		Tr. 713
3472D-2 to 3472D-3, incl.	Tr. 713	Tr. 714
3472E	Tr. 615	
3472E-1	Tr. 685	Tr. 699
3472E-2 to 3472E-5, incl.	Tr. 699	
3472E-6, 3472E-7	Tr. 700	
3472F	Tr. 732	Tr. 739
3472F-1	Tr. 740	Tr. 747
3472F-2	Tr. 740	Tr. 747, 749
3472F-3	Tr. 750	Tr. 752
3472F-4	Tr. 750	Tr. 752
3472F-5	Tr. 750	Tr. 753
3472F-6	Tr. 750	Tr. 755
3472F-7	Tr. 757	Tr. 761
3472F-8	Tr. 805	Tr. 809
311A		Tr. 766
311B		Tr. 818

DEFENDANT'S EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
311C		Tr. 815
311A-1	Tr. 766	Tr. 952
311A-2	Tr. 952	Tr. 957
311A-3	Tr. 952	Tr. 957
311A-4 to 311A-9, incl.	Tr. 958	Tr. 972
311A-10	Tr. 1237	Tr. 1239
311A-11	Tr. 1237	Tr. 1240
311A-12	Tr. 1237	Tr. 1243
311A-13	Tr. 1237	Tr. 1244
311B-1	Tr. 972	Tr. 985
311B-2 to 311B-5, incl.	Tr. 985	Tr. 989